



COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: EVELYN BROWN
Executive Director
Board of Social Work

FROM: LYNNE FLEMING *Lynne Fleming*
Assistant Attorney General

DATE: September 20, 1995

RE: Virginia Code § 32.1-127.1:02

In its 1995 session, the General Assembly passed a new statute which governs the ownership and production of medical records in all situations except litigation. This statute is codified at Va. Code § 32.1-127.1:02, with an additional component at § 54.1-2403.3. Copies of the statute are attached for your reference. While the statute does provide answers to common concerns, there are several limitations to its application. Key points concerning the statute are discussed below.

Applicability: Subpart A of the new statute provides that the law pertains to health care providers, as that term is defined in the section of the Code containing definitions pertinent to medical malpractice. I have attached a copy of that definition section. Please be aware that the definition applies only to licensed hospitals and certain licensed professionals. Within the area of mental health services, it does not apply to licensed social workers, school psychologists, psychologists, certified substance abuse counselors, rehabilitation providers or marriage and family therapists. Unlicensed hospitals are not in the definition: None of Virginia's state-run hospitals are licensed.

Ownership of records: For those individuals and entities who are within the statute, Subpart B provides that medical records are the property of the health care provider maintaining them.

Release of records: Subpart C specifies when records may be released. The wording of Section C(i) is confusing, but apparently says that records must be released upon written consent of any of the following: the patient, the patient's legal representative, a minor patient's parent, guardian or legal representative or any person specified in Va. Code § 54.1-2969.

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Therefore, even if a minor consents to outpatient mental health treatment and specifically refuses consent to release his/her record to his parents, a parent may authorize release to himself or his spouse. A custodial parent cannot block release to a non-custodial parent.

Subpart C(ii) requires health care providers to provide records to authorized state and federal authorities. This should assure health care providers that their release of records to the Department of Health Professions, for example, is required by law.

Subpart C(iii) provides a hierarchy of individuals who may obtain the records of deceased patients.

Form of request for records: Requests for records must be made in writing and must contain specific information detailed in Section D of the statute.

Exceptions: Subpart E permits only a physician or clinical psychologist to enter a note in a patient's record indicating that release would be detrimental to the patient. However, production of the record is refused on the basis of such notation, the health care provider must inform the patient that he/she has a right to have the determination reviewed by another physician/clinical psychologist of the patient's choosing. The record must be provided to the selected reviewer. The statute is silent about what happens if the health care providers disagree, but presumably the reviewing health care provider would provide the record to the patient.

Enforcement: There is no specified means of enforcing this statute. Since most Boards in the Department have a statute or regulation which prohibits licensees from violating state law, a refusal to produce records could be heard as a disciplinary matter.

Charges for records: The statute does not mention any limitation on charges for producing patient records.

Relationship to other statutes: Va. Code § 8.01-413, which has long been in existence, applies solely to production of medical records for purposes of litigation. This statute, not the new law, would govern the production of records pursuant to a subpoena or if a written request is received from an attorney requesting the records for purposes of assessing the appropriateness of potential litigation. This statute does specify limitations on charges for records and does provide a specific means for enforcing compliance.

Federal law governing alcohol and drug abuse treatment records, appearing at 42 USC 290dd-2, supersedes all state law provisions.

I hope this information is helpful to you.

Attachment

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding sections numbered 32.1-127.1:02 and 54.1-2403.3 as follows:

§ 32.1-127.1:02. *Medical records; ownership; provision of copies.*

A. As used in this section, "health care provider" shall have the same meaning as set forth in § 8.01-581.1, and "medical record" shall have the same meaning as set forth in § 42.1-77.

B. Medical records are the property of the health care provider maintaining them and shall be removed from the premises where they are maintained without approval of the owner only in accordance with court order or subpoena consistent with § 8.01-413, or in accordance with other provisions of state or federal law.

C. Health care providers shall keep medical records confidential and only authorized personnel shall have access to such records. Health care providers shall release copies of a patient's medical record only (i) to any person with the written consent of the patient; the patient's legal representative; a minor patient's parent, guardian, or legal representative; or other person authorized to consent to treatment of minors pursuant to § 54.1-2969; (ii) to duly authorized state or federal health authorities or others as specifically authorized by the provisions of this Code or of federal law; or (iii) in connection with the work of any entity established as set forth in § 8.01-581.16 to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges. Records relating to a deceased patient or a patient determined by his attending physician to be incapable of making an informed decision, as that condition is defined in § 54.1-2982, shall be provided to any of the following persons, in order of priority stated, upon the written request of such person, unless the health care provider maintaining the records is aware of any available person in a higher class: (i) the personal representative of a deceased patient; (ii) a legal guardian or committee of the patient; (iii) the patient's legal spouse; (iv) an adult child of the patient; (v) either parent of the patient; (vi) an adult brother or sister of the patient; or (vii) any other relative of the patient in the descending order of blood relationship. Copies of medical records requested for purposes of litigation shall be requested and provided in accordance with the provisions of § 8.01-413.

D. Requests for copies of medical records shall (i) be in writing, dated, and signed by the requester; (ii) identify the nature of the information requested; and (iii) include evidence of the priority of the requester to receive such copies and identification of the person to whom the information is to be disclosed. Within fifteen days of receipt of a request for copies of medical records, the health care provider shall do one of the following: (i) furnish such copies to any requester authorized to receive them; (ii) inform the requester if the information does not exist or cannot be found; (iii) if the health care provider does not maintain a record of the information, so inform the requester and provide the name and address, if known, of the health care provider who maintains the record; or (iv) deny the request (a) under subsection E of this section, (b) on the grounds that the requester has not established his authority to receive such records or proof of his identity, or (c) as otherwise provided by law. Procedures set forth in this section shall apply only to requests for medical records not specifically governed by other provisions of this Code or of federal law.

E. Copies of a patient's medical records shall not be furnished to such patient or anyone authorized to act on the patient's behalf where the patient's attending physician or the patient's clinical psychologist has made a part of the patient's record a written statement that, in his opinion, the furnishing to or review by the patient of such records would be injurious to the patient's health or well-being. If any custodian of medical records denies a request for copies of records based on such statement, the custodian shall permit examination and copying of the medical record by another such physician or clinical psychologist selected by the patient, whose licensure, training and experience relative to the patient's condition is at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based. The person or entity denying the request shall inform the patient of the patient's right to select another reviewing physician or clinical psychologist under this subsection who shall make a judgment as to whether to make the record available to the patient. Any record copied for review by the physician or clinical psychologist selected by the patient shall be accompanied by a statement from the custodian of the record that the patient's attending physician or clinical psychologist determined that the patient's review of his record would be injurious to the patient's health or well-being.

§ 54.1-2403.3. *Medical records; ownership; provision of copies.*

Medical records maintained by any health care provider as defined in § 8.01-581.1 shall be the property of such health care provider. Such health care provider shall release copies of any such medical records in compliance with § 32.1-127.1:02 or § 8.01-413, if the request is made for

§ 8.01-581.1. Definitions. — As used in this chapter:

"Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement.

"Health care provider" means (i) a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered nurse or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor, licensed dental hygienist or health maintenance organization, (ii) a professional corporation, all of whose shareholders or members are so licensed, (iii) a partnership, all of whose partners are so licensed, (iv) a nursing home as defined in § 54.1-3100 except those nursing institutions conducted by and for those who rely upon treatment by spiritual means alone through prayer in accordance with a recognized church or religious denomination, (v) a professional limited liability company comprised of members as described in § 13.1-1102 A 2, or an officer, employee or agent thereof acting in the course and scope of his employment, or (vi) a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or engages a licensed health care provider and which primarily renders health care services.

"Health maintenance organization" means any person licensed pursuant to Chapter 43 (§ 38.2-4300 et seq.) of Title 38.2 who undertakes to provide or arrange for one or more health care plans.

"Hospital" means a public or private institution licensed pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 or Chapter 8 (§ 37.1-179 et seq.) of Title 37.1.

"Impartial attorney" means an attorney who has not represented (i) the claimant, his family, his partners, co-proprietors or his other business interests; or (ii) the health care provider, his family, his partners, co-proprietors or his other business interests.

"Impartial health care provider" means a health care provider who (i) has not examined, treated or been consulted regarding the claimant or his family; (ii) does not anticipate examining, treating, or being consulted regarding the claimant or his family; or (iii) has not been an employee, partner or co-proprietor of the health care provider against whom the claim is asserted.

"Malpractice" means any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.

"Physician" means a person licensed to practice medicine or osteopathy in this Commonwealth pursuant to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1.

"Patient" means any natural person who receives or should have received health care from a licensed health care provider except those persons who are given health care in an emergency situation which exempts the health care provider from liability for his emergency services in accordance with § 8.01-225. (Code 1950, § 8-911; 1976, c. 611; 1977, c. 617; 1981, c. 305; 1986, cc. 227, 511; 1989, cc. 146, 730; 1991, cc. 455, 464; 1993, c. 268; 1994, cc. 114, 616, 651.)